...YORK COUNTY

PRESENT: Hon. EDWARD H. LEHNER PART 19

Justice

LANDMARK EDUCATION

-v-

MACRITE CLIPACCHI

INDEX NO. 115873/98

MOTION DATE 10/26/98

MOTION SEQ. NO. 007

MOTION CAL. NO. ____

The following papers numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

✓ motion is decided in accordance with accompanying memorandum decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: ____ J.S.C.

Dated: APR 28 1999

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

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LANDMARK EDUCATION CORPORATION,
a California corporation,

Plaintiff,

-against- Index No.: 115873/98

HACHETTE FILIPACCHI MEDIAS GROUP, d/b/a ELLE MAGAZINE and ROSEMARY MAHONEY,

Defendants.

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EDWARD H. LEHNER, J.:

The defendants Hachette Filipacchi Medias Group, d/b/a Elle Magazine ("Elle Magazine") and Rosemary Mahoney ("Mahoney") move for an order pursuant to CPLR 3211(a)7 dismissing the complaint for failure to state a cause of action.

The plaintiff Landmark Education Corporation ("Landmark") offers an educational program to the public. The program topics include communication, time management and productivity. The basic program is a seminar costing the sum of $375 which takes place over three days. The stated goal of the program is to discover ways of enhancing productivity, improve relationships, and achieve greater satisfaction. The complaint alleges that an article about Landmark appearing in Elle Magazine, written by Mahoney, "conveyed ... defamatory meanings of and concerning plaintiff" including that 1) Landmark is engaged in a criminal mass marketing pyramid scheme aimed at the weak and easily manipulated, and employs hustlers as instructors;

001

2) Landmark uses coercive thought control, hypnotic processes and brain washing to denigrate critical thinking and common notions of morality; and 3) Landmark promulgates the ideas of Nazi sympathizers, fascists and carnival hucksters. Mahoney wrote the article after attending a forum conducted by Landmark's employee Beth Handel.

The following 13 specific alleged defamatory statements are set forth in the complaint: (1) "... they [the forum] take away the base that makes a moral view possible for each individual and call it freedom"; (2) The Forum is a mass- marketing pyramid scheme ...; (3) trafficking in subtly coercive thought reform and bent on ensnaring the weak of character in a slick web of palliative jargon; "Welcome to your 'Forum!' she [Beth Handel, Forum leader] barks, launching into an impeccably executed performance laden with...pithy quotations ranging from philosopher (and Nazi sympathizer) Martin Heidegger ..."; (5) "What does the Forum promise?" With notable condescension Handel answers, "You'll get what you want by the end of the day That's just how it works."; (6) an idea purloined from the theories of Heidegger.; (7) Is she saving our lives or is she reaching into our handbags for our checkbooks?... Beth Handel knows how to hustle.; (8) My $375 has bought me a flimsy synthesis of world philosophies, littered with the sort of aphoristic suggestions abundant in high school year books; (9) paralleling aspects of... Fascism, and carnival hucksterism.;

(10) in a kind of informal hypnotic process people can become submissive to voices of authority through a series of indirectly applied techniques of suggestion. Such hypnosis, practiced without formal trance induction, employs jokes, confusion, guilt, humiliation, group pressure, and sleep deprivation to assert its control. The stories leaders tell- known as "killer shares" among experts who study such self-actualization groups- are rehearsed but apparently spontaneous anecdotes calculated to deliver an emotional message; (11) Strategically placed suggestions are another form of subtly coercive influence. When Handel says at the start of our group experience of fear, "There might be some crying during this exercise," the suggestion is that we should cry.; (12) there is, experts agree, a denigration of critical thinking.; (13) in the end, the transformational key the Forum offers is nothing more than words, *My life has been transformed.* Say it enough times and it might come true.

In support of their motion to dismiss, the defendants argue that the complaint fails to state a cause of action for product disparagement because: it fails to plead special damages; the complained of statements are not of and concerning the plaintiff; the statements are not defamatory; and they constitute protectible opinion. In opposition to the motion to dismiss, the plaintiff argues that the article is about Landmark, the statements are defamatory rather than product disparagement, and the statements are not opinion.

The standard to be applied on a motion to dismiss a defamation complaint for legal insufficiency is: "If , upon any reasonable view of the stated facts, plaintiff would be entitled to recovery for defamation, the complaint must be deemed to sufficiently state a cause of action." (Silsdorf v Levine, 59 NY2d 8, 12 [1983], cert. denied 464 US 831 [1983]). In order to prevail on a product disparagement claim, the plaintiff must prove both malice and special damages (Ruder & Finn v Seaboard Surety Co., 52 NY2d 663, 670-671 [1981]). Actual malice is defined as making an alleged false statement with knowledge that it was false or with reckless disregard as to whether it was false or not (New York Times Co. v Sullivan, 376 US 254, 280 [1964]; Thanasoulis v National Association for the Specialty Foods Trade, Inc., 226 AD2d 227, 228 [1st Dept 1996]).

As in any libel action, the court has the obligation to accord protection to a party's reputation without impairing our "cherished constitutional guarantee of free speech" [Immuno, A.G. v Moor Jankowski, 77 NY2d 235, 256 (1991)]. In this regard, our Court of Appeals has indicated the particular value of summary adjudication "where appropriate" in libel cases (id.).

For there to be recovery in libel, it must be established that the defamation was "of and concerning the plaintiff" (Gross v Cantor, 270 NY 93, 96 [1936]). The plaintiff need not be named in the publication but, if it is not, the plaintiff must sustain

the burden of pleading and proving that the defamatory statement referred to it. The reference to the plaintiff may be indirect and may be shown by extrinsic facts. Where the plaintiff relies on extrinsic facts to prove such reference, the plaintiff must show that it is reasonable to conclude that the publication refers to it and the extrinsic facts upon which that conclusion is based were known to those who read the publication (Geisler v Petrocelli, 616 F2d 636 [2d Cir 1980]). Here plaintiff has sufficiently pled facts to satisfy this requirement.

Whether particular words are defamatory presents a legal question to be resolved by the court in the first instance (Weiner v Doubleday & Co. 74 NY2d 586, 592 [1989], cert denied 495 US 930 [1990]; Millus v Newsday, Inc., 89 NY2d 840, 842 [1996]). The words must be construed in the context of the entire publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction (Carney v Memorial Hospital and Nursing Home of Greene County, 64 NY2d 770 [1985]; Steinhilber v Alphonse, 68 NY2d 283 [1986]).

A statement is not actionable if it is an expression of pure opinion, no matter how vituperative or unreasonable it may be. Four factors are considered in making this assessment: (1) whether the specific language employed is either precise or vague

and ambiguous, (2) whether the statement may be objectively characterized as either true or false, (3) the context in which the statement appears and (4) the broader social setting surrounding the communication, including a custom or convention which might serve to indicate that it is an expression of opinion and not fact (Steinhilber v Alphonse, [supra]; Brian v Richardson, 87 NY2d 46, 51 [1995]).

The plaintiff has not pled special damages in the complaint. This failure mandates dismissal of the complaint to the extent the complaint can be read to plead product disparagement. A reading of the complaint leads to the inescapable conclusion that it is in fact for disparagement of plaintiff's product, to wit; the subject course. Additionally, the complaint must be dismissed for failure to adequately plead actual malice. The complaint makes a conclusory allegation of such malice, but no facts are pled indicating that the defendants entertained any serious doubts as to the veracity of their article (see, Freeman v Johnston, 84 NY2d 52, [1994], cert. denied 513 US 1016 [1994].

Finally, the court finds that the statements are not reasonably susceptible of a defamatory meaning, and are constitutionally protected expressions of opinion. Pure opinion is a statement accompanied by a recitation of the facts upon which it is based or does not imply that it is based upon undisclosed facts (Steinhilber v Alphonse, supra, 68 NY2d at 289). Here, contrary to the plaintiff's assertion, the expressions of

opinion were sufficiently supported by a recitation of the underlying facts. Nor are any of the alleged defamatory words referring to a "pyramid scheme" reasonably susceptible to a connotation of criminalty. See, 600 West 115th Street Corp. v Von Gutfeld, 80 NY2d 130 (1992); Coffee v Arnold, 104 AD2d 352 (2d Dept 1984).

Accordingly, the clerk shall enter judgment dismissing the complaint.

Dated: April 28, 1999

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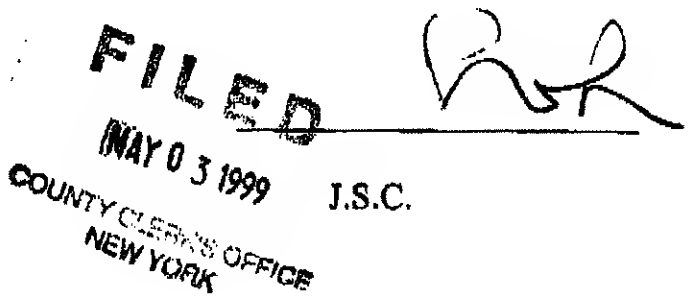

J.S.C.